83-1462

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Respondent

v.

JOHN HANDY JONES,
Defendant

INTERNATIONAL FIDELITY
INSURANCE COMPANY,
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in failing to hold that the government was required to initiate formal proceedings under Rule 46(e)(1), Federal Rules of Criminal Procedure when a defendant is known to have violated the terms of his bond.

2. Whether the District Court and the Court of Appeals erred in failing to hold that the government breached its contract with the surety.

3. Whether the Court of Appeals erred in holding that under the circumstances of the case, the failure of the government to commence formal proceeding under Rule 46(e)(1) F.R.Cr.P. did not prejudice the surety.

PARTIES TO THE PROCEEDINGS

All parties are listed in the caption.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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INTERNATIONAL FIDELITY INSURANCE COMPANY Prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit which confirmed the Order of Forfeiture entered by the United States District Court for the Northern District of Texas, Dallas Division.

OPINIONS BELOW

The District Court Order granting Motion for Judgment of Default and Bond Forfeiture (Appendix A) was filed on November 30, 1982. The Court of Appeals opinion was filed on November 7, 1983. (Appendix B) Petition for Rehearing was denied on November 28, 1983. (Appendix C)

JURISDICTION

The Judgment of the Court of Appeals was entered on November 7, 1983 (Appendix B), and the Order Denying Rehearing was entered on November 28, 1983 (Appendix C). The jurisdiction of the Court is conferred by 28 U.S.C. § 1254(1).

STATUTES AND RULES IN THE CASE

Because of their length, the statutes and rules in this case are set out in Appendix D. These statutes and rules are:

The Bail Reform Act of 1966, 18 U.S.C. §§ 3141-3156.

Rule 46 of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE WITH FACTS RELEVANT TO ISSUES ON REVIEW BEFORE THE COURT

Petitioner, INTERNATIONAL FIDELITY INSURANCE COMPANY, was surety on an appeal bond of which JOHN HANDY JONES was principal. Jones was tried before the United States District Court for the Northern District of Texas, Dallas Division. He was

found guilty of charges arising from his participation in an international marijuana importation scheme. On January 31, 1978, he was released on bond pending the outcome of his appeal.

On or about July 7, 1978, Jones was delivered to Drug Enforcement Agency representatives in LaPaz, Bolivia where he had been arrested by Bolivian authorities for involvement in a cocaine deal.

By reason of the fact that a condition of Jones' release required that he remain within the jurisdictional limits of the Northern District of Texas, a Motion to Revoke his bond was filed. On or about July 9, 1978, Jones was returned to Dallas, Texas.

On July 10, 1978, an Assistant United States Attorney released Jones to the DEA with whom Jones had agreed to cooperate. The Motion for Judgment of Default and Bond Forfeiture was withdrawn. As far as is known, Jones has not been seen since the date of his release.

On February 1, 1979, the Court of Appeals affirmed Jones' conviction, and on October 1, 1979, his Writ of Certiorari to the United States Supreme Court was denied.

On October 17, 1979, the district court issued an order for Jones to report to the United States Marshal Service at 12:00 noon on October 22, 1979, to commence serving the sentence imposed by the Court on August 5, 1977.

Jones failed to appear as ordered and on June 13, 1980, an order declaring a bond forfeiture was filed.

On March 25, 1983, a hearing on the action was held and the Motion was in all things granted.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The opinions below raise constitutional, procedural and substantive questions not previously addressed by any court. This is a case of first impression.

Issue One: The failure of the Court of Appeals for the Fifth Circuit to rule that the statutes and rules for pre-trial and post-trial release require that the government bring before the district court any person who has violated the terms of his bond and thereby set in motion formal bond forfeiture proceedings under Rule 46(e)(1) Federal Rules of Criminal Procedure, 18 U.S.C.

This issue itself goes to the matter of the constitutional separation of powers. Stated in the inverse, the issue revolves around the authority, if any, vested in an agency of the executive branch to withhold from the judiciary such persons and information as may be necessary for the courts to perform their mandated functions under statute and rule.

It is well established that the legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized. *Federal Trade Commission v. Jantzen*, 87 S.Ct. 998, 1003 (1967).

The statute in which Congress set the policy with regard to release of bail of convicted persons awaiting outcome of their appeals states:

> A person—who has been convicted of an offense—and has filed an appeal—shall be treated in accordance with the provisions of section 3146 unless the *court or judge* has reasons to believe that no one

> or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. If such risk of flight or danger is believed to exist—the person may be ordered detained. 18 U.S.C. § 3148.

18 U.S.C. § 3148 provides for the release of convicted persons. There is no other statutory authority for the release of convicted persons. *United States v. Burns*, 667 F.2d 781, 783 (9th Cir. 1981).

The defendant herein had been convicted and was free on bond awaiting the outcome of his appeal when he was taken into custody by DEA agents in LaPaz, Bolivia, and returned to the United States. Charges of bond violation were filed against him on or about July 7, 1979.

A violation of a condition of a bond imposed under 18 U.S.C. § 3146(a) is not a criminal offense under section 3146(c), but merely sets the judicial machinery in motion and empowers a court, not a DEA agent, to determine whether punitive action is warranted. *United States v. Williams*, 594 F.2d 86, 94 (5th Cir. 1979).

In this case the defendant was not taken before a court, but on the sole authority of an Assistant United States Attorney was turned back to the custody of DEA agents who on, or about July 10, 1979, released him for reasons of their own.

There is no authority for such release by other than a court or judge, § 3148, or a judicial officer, § 3146.

Neither an Assistant United States Attorney nor a DEA agent qualifies as a judicial officer within the meaning of 18 U.S.C. § 3156.

Following the filing of a notice of appeal, the district court "retains jurdisdiction over the person of the defendant at least for the limited purposes of reviewing, altering, or amending the conditions under which the court released the defendant, and is empowered to revoke or forfeit the defendant's bond during the pendency of appeal for any of the reasons which would have supported an initial denial of the defendant's application for release." *United States v. Black*, 543 F.2d 35 (5th Cir. 1976).

The statutes and cases cited clearly place the matter of a convicted person's release and the continuation thereof squarely under the court or judge who released him following his conviction. There is no authority for intervention in that jurisdiction. *Burns*, supra.

There is no question that Jones was apprehended several thousand miles beyond the area to which his appeal bond restricted him and that he was thereby in violation of one of the conditions of his bond.

If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail, Rule 46(e)(1) Federal Rules of Criminal Procedure. 18 U.S.C. Forfeiture under this rule is mandatory. *United States v. Stanley*, 601 F.2d 380 (9th Cir. 1979); *United States v. Cervantes*, 672 F.2d 460 at 461 (5th Cir. 1982).

If it be clear that the Congress, in the exercise of its power to establish policy, assigned exclusive authority to courts and judges to control the release of convicted persons then it must follow that any government agency is required, without exception, to bring before the district court any person in its custody who has violated his bond following conviction. To hold otherwise would be to hold

that minor functionaries of the executive branch are at liberty to ignore Congressional mandates and to usurp the functions of the judiciary.

While the Court of Appeals for the Fifth Circuit is correct in noting that petitioner cited no jurisprudential authority for contending that the government had a duty to set in motion formal bond forfeiture proceedings upon learning of a defendant's breach of the terms of his bond, such citation was not necessary for the court to reach the conclusion that such contention was correct.

In fact petitioner knows of no jurisprudential authority which supports its position. On the other hand, none has been found to the contrary. As far as is known to petitioner, this is a case of first impression. However, sensible construction of an act may compel a given conclusion. *Jantzen*, supra.

Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in establishing these rights and obligations, to determine, in addition, who may enforce them and in what manner. *Davis v. Passman*, 99 S.Ct. 2264 (1979).

As has been shown, courts and judges have the right and obligation to determine the circumstances of release of convicted persons, § 3148. There is no other statutory authority. *Burns*, supra.

Therefore, sensible construction of the statutes and the rules for criminal procedure must compel the conclusion that a duty is imposed upon the agencies of the executive branch to bring before a court or judge any person known to have violated a condition of his bond, there being no other means by which courts and judges can acquire the

requisite information and control over bond violators to carry out the rights and obligations placed on them by statute and rules. *Williams*, supra.

The fact that the aforementioned duty arises only by intimation should not have prevented a ruling by the Court of Appeals where, as here, that intimation is clear and strong. *Jantzen*, supra.

It is the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose. *Cort v. Ash*, 95 S.Ct. 2080 at 2090 (1975).

As this case demonstrates, the statutes and rules do not set out clearly the obligation of the government to bring before the court a convicted person who has violated a condition of his bond, and a definitive ruling is required. *Cort*, supra.

It is concluded, therefore, that the Court of Appeals for the Fifth Circuit erred in failing to hold that the government is required to bring before the district court, for proceedings under Rule 46(e)(1), a convicted person who had violated the conditions of his bond as set by that district court.

Issue Two: Did the failure of the government to take the defendant herein before the court breach the contract between the government and the surety?

A bail bond is to be construed in the same manner as any other contract or suretyship under federal common law principles, *United States v. Miller*, 539 F.2d 445 (5th Cir. 1976).

Laws in force at the time of making of a contract enter into and form a part of that contract as if they were

expressly incorporated in the terms, *East Texas Motor Freight v. United States*, 239 F.2d 415 at 418 (5th Cir. 1956).

If it be held that the laws and statutes in effect at the time defendant was returned to custody did at that time require a judicial proceeding under Rule 46(e)(1), then it must be concluded that the failure of the government to take the defendant before the Court was a breach of the contract between the government and the surety.

Issue Three: Was petitioner prejudiced by the failure of the government to set in motion formal proceedings under Rule 46(e)(1) of the Federal Rules of Criminal Procedure following the arrest of the defendant for violation of the conditions of his bond?

The resolution of this issue turns upon the difference between the forfeiture of a bond as a result of a violation of the terms of the bond under circumstances where the defendant is in custody and a forfeiture based on a violation of 18 U.S.C. § 3150 under circumstances where the defendant is not in custody.

The violation of a condition of a bond is not a criminal offense, *United States v. Williams*, 594 F.2d 86, at 94 (5th Cir. 1979). If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail. The forfeiture is mandatory. *United States v. Stanley*, 701 F.2d 380 at 382 (9th Cir. 1979).

Although the forfeiture is mandatory, remission under the terms of Rule 46(e)(2) is possible if certain conditions are met, *United States v. Parr*, 594 F.2d 440 (5th Cir. 1979). The bond forfeiture ought to bear some

reasonable relation to the cost and inconvenience to the government of regaining custody. *Id.*

Had the defendant in this case been taken before the court at the time he was in custody, there existed some possibility that at least a portion of the bail would have been remitted by the Court.

That the defendant might flee if freed on the same bond was readily foreseeable: the defendant had more than adequately demonstrated both the inclination and the capability of travelling abroad at will in spite of the area limitations and other conditions imposed by his bond. Hindsight should have made it obvious that the conditions of his release were and remained inadequate to assure his appearance as required. *United States v. Skipper,* 633 F.2d 1177 (5th Cir. 1981).

By freeing the defendant and making possible his disappearance, however, the government caused bond forfeiture to be declared at a time when the defendant was not in custody. Not only is non-appearance as required the most serious offense under the Bail Reform Act, *United States v. Brown,* 410 F.2d 212, at 216 (5th Cir. 1969), remission of the forfeiture while the defendant is still at large would undermine the purpose of the bond which is to assure the presence of the accused. See *Skipper,* supra at 1180.

The failure of the government to move for forfeiture while the defendant was in custody did, therefore, deprive the petitioner of a valuable right, that of the opportunity to recover at least a portion of the bail.

It is concluded, therefore, that the failure of the government to initiate proceedings under 46(e)(1) at a time

when the defendant was in custody deprived petitioner of a valuable right under Rule 46(e)(2).

For the reasons set forth herein, Petitioner requests that a Writ of Certiorari issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the above have, according to the rules of this Court, been served on the opposing counsel by placing said copies in the United States mails addressed to the United States Attorney for the Northern District of Texas, Dallas Division.

Said copies were delivered to the United States Postal Service on this 23rd day of February, 1984.

C. Anthony Friloux Jr.

C. ANTHONY FRILOUX, JR.

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Criminal Action No.
CR-3-77-115

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN HANDY JONES,
Defendant.

ORDER

In this criminal action the government by motion seeks judgment by default and bond forfeiture of an appearance bond in the amount of $100,000 executed by the defendant John Handy Jones (Jones), as principal, and by International Fidelity Insurance Company (International Fidelity), as surety. Notice of the government's motion was served on International Fidelity on March 31, 1981, it filed a written opposition to the relief sought in the motion. The Court having considered the pleadings of the parties, the evidence presented at an evidentiary hearing, and the argument of counsel for parties is of the option that the government's motion should be granted.

The following facts have been demonstrated from the evidentiary hearing and record in this action. Jones along with others was convicted of several charges relating to the importation of marijuana from Mexico to the United States. On August 5, 1977, sentence was imposed on Jones and an appeal bond set in the amount of $100,000. On August 10 Jones gave notice of appeal. On January 20, 1978, the bond in issue was filed[1] and Jones was released from custody. On July 7, 1978, a complaint was filed against Jones charging him with the importation of drugs. Jones was apprehended in Bolivia and returned to the United States a day or two later by agents of the Drug Enforcement Agency (DEA). Prior to Jones' apprehension in Bolivia International Fidelity was unaware that Jones had left the jurisdiction of the Northern District of Texas without permission. However, International Fidelity did become aware of Jones' arrest in Bolivia and

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1. The bond contained the following relevant language:

> The conditions of this bond are that the defendant shall prosecute his appeal and make all appearances required or directed in connection therewith, shall make his appearance in connection with any further proceedings directed in this court, and shall immediately surrender himself in execution of any final judgment entered herein by this Court or any appellate court on final termination of the proceedings, and shall not depart the territorial jurisdiction of the Northern District of Texas without permission of this court in writing.
>
> If defendant obeys and performs the foregoing conditions of this bond, then it shall be null and void. Otherwise, if defendant fails to obey any or all conditions of this bond, forefeiture may be declared and action taken to enforce it as provided by law. A warrant for the arrest of defendant shall issue immediately.

The bond was executed by Jones, as principal, and by Don Vannerson (Vannerson) as agent for International Fidelity, as surety, and approved by the District Judge on January 20, 1978. In this circuit any challenge that involves the interpretation of the language of the bond is controlled by federal common law. United States v. Miller, 539 F.2d 445, 447 n.2 (5th Cir. 1976) reh. denied, 542 F.2d 576.

that he was in custody in the United States. Based on this knowledge International Fidelity then attempted to secure a release from appearance bonds it had made for Jones on state charges which were pending against him. However, International Fidelity made no effort to be released from the bond in this action, nor did it request of the government that if Jones was released he be released to International Fidelity's custody. International Fidelity's failure to seek release from the bond was based on its impression that when Jones was apprehended by the DEA on the new charges it was automatically released from all obligations under this bond.

While in custody of the DEA Jones agreed to cooperate with the DEA in the pursuit of its investigation into narcotic trafficing. To what extent Jones agreed to cooperate does not appear in the record nor was it developed at the evidentiary hearing. In exchange for Jones' cooperation the government agreed it would not move to revoke the bond in this action and would release Jones and dismiss the then pending complaint against him. The complaint was dismissed on July 9 and Jones was released from custody about July 10. Thereafter Jones disappeared again. Notice of Jones' release from custody was not given by the government to International Fidelity. However, International Fidelity did become privy to this event when Jones' wife later advised Vannerson that Jones had been released by the DEA and he had disappeared. International Fidelity attempted to locate Jones but was unable to do so, and it concluded that he had returned to South America.

On February 1, 1979, Jones' conviction was affirmed by the Fifth Circuit. *United States v. Michel*, 588 F.2d

986. On August 11 Jones was ordered to report and commence the service of the sentence of incarceration that had been imposed. On October 1 application for writ of certiorari was denied. ____U.S.____. On October 11 an arrest warrant was issued and Jones was also ordered to report to commence serving his sentence on October 22. He failed to report as directed and on January 15, 1980, the United States Marshal designated Jones a fugitive. At no time has International Fidelity moved this Court to release it from the obligations of this appearance bond except through its opposition to the government's motion to forfeit the bond.

International Fidelity does not challenge the fact that the bond covers Jones' failure to surrender following the loss of his appeal.[2] However, in its opposition to the government's motion, International Fidelity asserts that the government made it impossible for International Fidelity to be able to surrender Jones on the charges growing out of this action. It contends that the government failed to notify it of the fact that Jones was in custody and was going to be released from custody under an agreement that he would cooperate in an investigatory manner with the DEA. International Fidelity urges that had it been given this information, then it would have immediately taken steps to surrender Jones in this action and sought release as surety under the appearance bond. International Fidelity argues that since the actions of the government gave Jones the opportunity to again flee the jurisdiction of this court, the government should be barred from seeking forfeiture against it under the bond.

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2. The bond expressly required Jones to surrender in the event the appeal of his conviction was unsuccessful, and thus its forfeiture was the proper subject of the government's motion. United States v. Amend, 622 F.2d 782 (5th Cir. 1980).

In *United States v. Miller*, 539 F.2d 445 (5th Cir. 1976), having concluded that an appearance bond was subject to interpretation under federal common law principles applicable to suretyship agreements and contracts, *see* note 1, *supra*, the court went on to state:

> As a general rule the terms of a bail contract are to be construed strictly in favor of the surety, who may not be held liable for any greater undertaking than he has agreed to. *United States v. Eisner*, 323 F.2d 38, 43 (6th Cir. 1963). However, "[l]ike any other contract a bail bond should be construed to give effect to the reasonable intentions of the parties." *United States v. Gonware*, 415 F.2d 82, 83 (9th Cir. 1969).

Id. at 447. In later decisions, the Fifth Circuit has adhered to this pronouncement in the interpretation of appearance bonds. *See United States v. Amend*, 622 F.2d 782 (5th Cir. 1980); *United States v. Jones*, 607 F.2d 687 (5th Cir. 1979); and *United States v. Park*, 607 F.2d 687 (5th Cir. 1979).[3] With the foregoing principles in mind, an examination will be made of International Fidelity's contentions that it is not liable under the bond.

International Fidelity asserts that had it known the government planned to release Jones following his re-

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3. No distinction has been made in this circuit as to whether the surety was compensated or not. Other courts make this distinction, and when the surety is found to have been compensated, then in those instances an appearance bond is construed most strictly against the compensated surety and in favor of indemnity. *See, e.g.*, Stuyvesant Insurance Company v. United States, 410 F.2d 524, 525 n.4 (8th Cir.) *cert. denied*, 396 U.S. 836) (1969) (only where the facts under equitable principles would make it "unfair, inequitable or unjust" to hold the compensated surety should the surety be exonerated).

arrest in July 1978 on other charges, it would have sought to be relieved under the bond or would have surrendered Jones in this case which would have prevented Jones from fleeing again and exposing International Fidelity to liability. It is the government's culpability in failing to apprise International Fidelity of the plans to release Jones that International Fidelity contends prevented it from protecting itself from Jones' fleeing again. Under this theory International Fidelity attempts to read into the terms of the bond a general obligation on the part of the government to notify it of any actions the government might take with Jones on other federal charges that Jones became subject to. The Court is of the opinion that no such broad obligation can be imposed on the government under the terms of the bond. The language of the bond construed in a light favorable to International Fidelity, does not, directly or impliedly, impose such a duty on the government. Nor does International Fidelity cite any authority to this effect.

However, the government does have a duty not to make impossible the performance by the surety of its obligations under an appearance bond, and if the government's conduct or acts prevent the surety from performing as agreed, the surety is entitled to be exonerated from its obligations under the bond. This was the rule announced by the Supreme Court in a much earlier decision, *Reese v. United States,* 76 U.S. 13 (1870), wherein the Court stated:

> It would be against all principle and all justice to allow the government to recover against the sureties for not producing their principal, when it had itself consented to his placing himself beyond their reach and control.

76 U.S. at 22.[4] The initial query is: did the government, by rearresting Jones on other charges and then releasing him without notice to International Fidelity it impossible for International Fidelity to perform under the bond? The Court concludes in the negative.

The rearrest of Jones by agents of the DEA and his subsequent release did not in and of itself discharge International Fidelity of its obligations. *United States v. Kodelja*, 629 F.2d 1330 (9th Cir. 1980); *United States v. Egan*, 394 F.2d 262 (2nd Cir. 1968). The facts in *Kodelja* are similar to those in the instant action. After a criminal defendant's release on bail, he was rearrested on another federal charge. He again posted bail and was released. Shortly thereafter he fled. The government's effort to forfeit the first bail bond was met by the contention of the surety that the release of the defendant following his second arrest enlarged its risk. The court in *Kodelja* held that the first surety's "obligation to secure Kodelja's appearance continued unchanged and unhindered by the defendant's release from custody after the second arrest." 629 F.2d at 1332. Although a state court case was cited for the above quoted language, it appears such a rule of law falls "within the framework of general federal principles of suretyship and contract law" under which this bail bond is to be interpreted. *United States v. Miller*, 539 F.2d at 447.

The *Kodelja* court went on to point out that the first surety had a right to surrender the defendant at any time

4. Liability under a bail bond also will not be imposed on a surety when performance under the bond is rendered impossible by an act of God, the public enemy or the law. Tailor v. Taintor, 83 U.S. 366 (1873). International Fidelity does not rely on any of these three in its defense to the government's motion.

and thereby discharge itself from liability under the bond, and when it failed to do so after the second arrest, then its obligation on the bond continued. *Id.* at 1332. The surety's right under a bailbond to arrest and surrender the principal and thus be relieved of the obligations created by the bond has been a long standing right.

> When bail is given, the principle (sic) is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge, and if that cannot be done at once, they may imprison him until it can be done.

Tailor v. Taintor, 83 U.S. at 371. *See,* also, *Reese v. United States,* 76 U.S. at 544; *Fitzpatrick v. Williams,* 46 F.2d 40 (5th Cir. 1931). This principle is embodied in 18 U.S.C. § 1342, which authorizes a surety on an appearance bail bond to arrest the principal, to deliver him to the marshal and to petition the court for discharge under the bond. International Fidelity failed to take any steps to arrest Jones following his return from Bolivia to this country on the new charges. It was fully aware of Jones being in custody and at the time attempted to be released from its surety obligation under certain state bonds it had made for Jones. International Fidelity's conclusion that Jones' rearrest exonerated it under the instant bond was not wellfounded. It was not exonerated, but continued to have an obligation as contracted to produce Jones when ordered in this action.

In *Taylor,* a principal under a bail bond in Connecticut left that state and traveled to New York, where he was arrested on an extradition warrant from Maine and to

whence he was sent to answer pending charges. In seeking exoneration on the bail bond, the Connecticut sureties urged that by virtue of an act of law, the extradition proceedings, the performance of the bail bond could not be accomplished and they, the sureties, should be released from liability. The Supreme Court held otherwise, and in so doing stated:

> The [sureties] are in fault for the departure [of the principal] from Connecticut, and they must take the consequences. But their fault reached further. Having permitted their principal to go to New York, it was their duty to be aware of his arrest and to interpose their claim on his custody.

83 U.S. at 373. If International Fidelity had desired to be released of its obligations under this bond after it found out Jones was in custody on the second charges, it should have at that time apprised the federal officials then holding Jones that if he was released that he be released into its custody so that he could then be surrendered in this action. International Fidelity's continuing obligation under the bond to surrender Jones as ordered was in no manner interrupted by his second arrest and subsequent release from custody. *Kodelja, supra.*

However, if Jones' release after his second arrest was accompanied by an agreement between he and the government which enlarged the limits of the bail or made it impossible for International Fidelity to perform its obligations, then International Fidelity could be entitled to exoneration on this bond. *Reese, supra.* The only indication of such is the fact that while in custody on the second charge Jones agreed to cooperate with the DEA in the investigation of narcotic trafficing in exchange for

the government agreeing not to forfeit this bond. There is no evidence as to the details of the agreement. The Court does not have any information whether or not the agreement called for conduct on the part of Jones which would make it more onerous on the part of International Fidelity to perform its duties under the bond. If it did, then the government could be barred from its forfeiture efforts; if not, then International Fidelity's liability remains unchanged. From the mere fact that Jones agreed to cooperate with the DEA the Court cannot conclude that this in any way enlarged on the limits of the bail bond here or somehow made it impossible for International Fidelity to perform. Jones' whereabouts remains a mystery and International Fidelity has not demonstrated that his absence is in any manner related to his agreement to assist the DEA in its operations against drug violations.

International Fidelity has not demonstrated any basis to exonerate it from its obligations under this bond nor to limit its liability to less than the full amount of $100,000 called for in the bond. The government's motion should be granted.

It is so ORDERED. The government is directed to furnish the Court with an appropriate judgment.

Dated this 30th day of November, 1982.

/s/ R. W. HILL
United States District Judge

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN HANDY JONES,
Defendant,

INTERNATIONAL FIDELITY
INSURANCE COMPANY,
Appellant.

No. 83-1042

November 7, 1983

Appeal from the United States District Court
for the Northern District of Texas

Before BROWN, TATE, and HIGGINBOTHAM, Circuit Judges.

TATE, Circuit Judge:

International, a surety, appeals from the district court judgment ordering forfeiture of its post-conviction bond issued to assure the appearance of the defendant Jones, should his conviction be affirmed on appeal. We affirm the forfeiture.

Jones was convicted of several felony counts and sentenced to ten years' imprisonment. He was released on post-conviction bond in January, 1978, pending disposition of his appeal. Fed. R. App. P. 9(b); 18 U.S.C. § 3148. His conviction was affirmed in 1979. An arrest warrant was issued, but returned with the notation that the marshal was unable to locate Jones, and that he was in a fugitive status. The district court ordered forfeiture of the $100,000 post-conviction bond issued by International. International appeals from that judgment.

International contends it should be exonerated itself from liability under its bond because the United States improperly increased the risk under the bond by reason of the following circumstances: While Jones' appeal was pending, he violated the conditions of his bond by leaving Texas for Bolivia, where he was arrested in July, 1978 for involvement in a drug transaction. He was immediately brought back to Texas by agents of the Drug Enforcement Agency ("DEA"). Jones agreed to work undercover for the DEA. Accordingly, the complaint against him for the 1978 violation was dismissed, and Jones was released—but once again he fled and his whereabouts have been unknown since then (although he is believed to be in South America).

International contends it is entitled to be exonerated from its obligation under the bond because, instead of surrendering Jones to the federal court, the DEA agents had released Jones upon his (broken) promise of undercover cooperation, without notifying International. The surety relies upon the principle established in *Reese v. United States*, 76 U.S. (9 Wall) 13, 19 L.Ed. 541 (1870), that the government may not enforce the for-

feiture of bond when the government itself has increased the risk or made impossible the exercise of the bail bondsman's right to arrest the individual and surrender him to authorities, and thus to relieve itself of further obligations under the bond.

We find no reversible merit in this contention.

Under the factual finding of the district court, not clearly erroneous, International had learned of Jones' 1978 re-arrest and return to the United States *prior* to his release then from re-arrest by the DEA. The record indicates, moreover, that International could have moved to be relieved from its bond at that time (as it had in the case of several state-court bonds for Jones), but did not do so on the mistaken assumption that the government had already moved to revoke the release on bond.

[1, 2] In this circuit, the standard for review for a district court refusal to remit part or all of a bond forfeiture is whether the trial court abused its wide discretion. *United States v. Hesse*, 576 F.2d 1110, 1114 (5th Cir. 1978). In the present instance, the government's release of Jones after his re-arrest in 1978 did not by itself violate the terms of the bond or lessen the liability of International, the surety, under those terms to pay the amount of the bond if Jones did not surrender himself at the time directed under the terms of the bond. *United States v. Miller*, 539 F.2d 445, 448 (5th Cir. 1976). As stated in *United States v. Kodelja*, 629 F.2d 1330, 1332 (9th Cir. 1980) in affirming a forfeiture, the surety's "obligation to secure [the defendant's] appearance continued unchanged and unhindered by the defendant's release from custody after the second arrest."

By reason of the principle expressed by the Supreme Court decision in *Reese, supra,* exoneration might be found warranted or at least equitable when the government's action has unreasonably increased the surety's risk that was reasonably contemplated by issuance of the bond. Here, however, International did not sustain any additional risk beyond those contemplated by its bond simply because the DEA agents released Jones without surrendering him to the court. International could have, for instance, protected itself by moving for relief from its bond *before* Jones was released from custody on his re-arrest in 1978. *See Stuyvesant v. United States,* 410 F.2d 524, 525-57 (8th Cir. 1969) (discussing instances of prejudice because the government made performance by the surety impossible).

We therefore find no abuse of the district court's wide discretion in ordering forfeiture under the factual circumstances here found.

[3] Nor are we able to perceive much force to International's argument that, somehow, it was prejudiced by the government's failure upon Jones' re-arrest in July, 1978 to set in motion formal forfeiture proceedings under Fed. R. Crim. P. 46, based upon Jones' violation of conditions of his bond by leaving Texas and by engaging in other criminal activities. Initially, we note, International cites no jurisprudential authority that imposes such a mandatory duty upon the government in the event of bond-condition violation.

Even assuming such a duty, however, we fail to perceive International's prejudice, through non-enforcement in 1978 of the allegedly mandatory portion of the federal rule

relied upon by International, which provides that "[i]f there is a breach of a condition of a bond, the district court *shall* declare a forfeiture of the bond." Rule 46(e)(1) (emphasis added). Forfeiture of the bond at the present later date (when Jones failed to appear for imprisonment following affirmance of his conviction) instead of by Rule 46 proceedings alleged by International to have been required in July 1978 (when Jones was rearrested and then released from custody) does not implicate any prejudice to International caused by the United States' belated institution of the present forfeiture proceedings.

Conclusion

Accordingly, we AFFIRM the judgment ordering forfeiture of the bond.

AFFIRMED.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN HANDY JONES,
Defendant,

INTERNATIONAL FIDELITY
INSURANCE COMPANY,
Appellant.

No. 83-1042

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

(November 23, 1983)

Before BROWN, TATE and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Tate
United States Circuit Judge

APPENDIX D

THE BAIL BOND REFORM ACT OF 1966, 18 U.S.C. §§ 3141-3156

§ 3141. Power of courts and magistrates

Bail may be taken by any court, judge or magistrate authorized to arrest and commit offenders, but only a court of the United States having original jurisdiction in criminal cases, or a justice or judge thereof, may admit to bail or otherwise release a person charged with an offense punishable by death.

June 25, 1948, c. 645, 62 Stat. 821; June 22, 1966, Pub. L. 89-465, § 5(b), 80 Stat. 217.

§ 3142. Surrender by bail

Any party charged with a criminal offense who is released on the execution of an appearance bail bond with one or more sureties, may, in vacation, be arrested by his surety, and delivered to the marshal or his deputy, and brought before any judge or other officer having power to commit for such offense; and at the request of such surety, the judge or other officer shall recommit the party so arrested to the custody of the marshal, and indorse on the recognizance, or certified copy thereof, the discharge and exoneretur of such surety; and the person so committed shall be held in custody until discharged by due course of law.

June 25, 1948, c. 645, 62 Stat. 821; June 22, 1966, Pub. L. 89-465, § 5(c), 80 Stat. 217.

§ 3143. Additional bail

When proof is made to any judge of the United States, or other magistrate authorized to commit on criminal charges, that a person previously released on the execution of an appearance bail bond with one or more sureties on any such charge is about to abscond, and that his bail is insufficient, the judge or magistrate shall require such person to give better security, or, for default thereof, cause him to be committed; and an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued, by such judge or magistrate, setting forth the cause thereof.

June 25, 1948, c. 645, 62 Stat. 821; June 22, 1966, Pub. L. 89-465, § 5(d), 80 Stat. 217.

§ 3144. Cases removed from State courts

Whenever the judgment of a State Court in any criminal proceeding is brought to the Supreme Court of the United States for review, the defendant shall not be released from custody until a final judgment upon such review, or, if the offense be bailable, until a bond, with sufficient sureties, in a reasonable sum, is given.

June 25, 1948, c. 645, 62 Stat. 821.

§ 3145. Parties and witnesses—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

On Preliminary Examination, Rule 5(b).

Before conviction; amount; sureties; forfeiture; exoneration, Rule 46.

Pending sentence, Rule 32(a).

Pending appeal or certiorari, Rules 38(b), (c), 39(a), 46(a, 2).[1]

Witness, Rule 46.

June 25, 1948, c. 645, 62 Stat. 821.

[1] Rules 38(b), (c), 39(a), abrogated, Dec. 4, 1967, eff. July 1, 1968. See Federal Rules of Appellate Procedure, 28 U.S.C.A.

§ 3146. Release in noncapital cases prior to trial

(a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions

(1) place the person in the custody of a designated person or organization agreeing to supervise him;

(2) place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;

(4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or

(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

(b) In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

(c) A judicial officer authorizing the release of a person under this section shall issue an appropriate order containing a statement of the conditions imposed, if any, shall inform such person of the penalties applicable to violations of the conditions of his release and shall advise him that a warrant for his arrest will be issued immediately upon any such violation.

(d) A person for whom conditions of release are imposed and who after twenty-four hours from the time of the release hearing continues to be detained as a result of his inability to meet the conditions of release, shall, upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release are amended and the person is thereupon released, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed. A person who is ordered released on a condition which requires that he return to custody after specified hours shall, upon application, be entitled to a review by the judicial officer who imposed the condition. Unless the requirement is removed and the person is thereupon released on another condition, the judicial officer shall set forth in writing the reasons for continuing the requirement. In the event that the judicial officer who imposed conditions of release is not available, any other judicial officer in the district may review such conditions.

(e) A judicial officer ordering the release of a person on any condition specified in this section may at any time amend his order to impose additional or different conditions of release: *Provided,* That, if the imposition of such additional or different conditions results in the detention of the person as a result of his inability to meet such conditions or in the release of the person on a condition requiring him to return to custody after specified hours, the provisions of subsection (d) shall apply.

(f) Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law.

(g) Nothing contained in this section shall be construed to prevent the disposition of any case or class of cases by forfeiture of collateral security where such disposition is authorized by the court.

Added Pub. L. 89-465, § 3(a), June 22, 1966, 80 Stat. 214.

§ 3147. Appeal from conditions of release

(a) A person who is detained, or whose release on a condition requiring him to return to custody after specified hours is continued, after review of his application pursuant to section 3146(d) or section 3146(e) by a judicial officer, other than a judge of the court having original jurisdiction over the offense with which he is charged or a judge of a United States court of appeals or a Justice of the Supreme Court, may move the court having original jurisdiction over the offense with which he is charged to amend the order. Said motion shall be determined promptly.

(b) In any case in which a person is detained after (1) a court denies a motion under subsection (a) to amend an order imposing conditions of release, or (2) conditions of release have been imposed or amended by a judge of the court having original jurisdiction over the offense charged, an appeal may be taken to the court having appellate jurisdiction over such court. Any order so appealed shall be affirmed if it is supported by the proceedings below. If the order is not so supported, the court may remand the case for a further hearing, or may, with or without additional evidence, order the person released pursuant to section 3146(a). The appeal shall be determined promptly.

Added Pub. L. 89-465, § 3(a), June 22, 1966, 80 Stat. 215.

§ 3148. Release in capital cases or after conviction

A person (1) who is charged with an offense punishable by death, or (2) who has been convicted of an offense and is either awaiting sentence or has filed an appeal or a petition for a writ of certiorari, shall be treated in accordance with the provisions of section 3146 unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained. The provisions of section 3147 shall not apply to persons described in this section: *Provided,* That other rights to judicial review of conditions of release or orders of detention shall not be affected.

Added Pub. L. 89-465, § 3(a), June 22, 1966, 80 Stat. 215.

§ 3149. Release of material witnesses

If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpena, a judicial officer shall impose conditions of release pursuant to section 3146. No material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

Added Pub. L. 89-465, § 3(a), June 22, 1966, 80 Stat. 216.

§ 3150. Penalties for failure to appear

Whoever, having been released pursuant to this chapter, willfully fails to appear before any court or judicial officer as required, shall, subject to the provisions of the Federal Rules of Criminal Procedure, incur a forfeiture of any security which was given or pledged for his release, and, in addition, shall, (1) if he was released in connection with a charge of felony, or while awaiting sentence or pending appeal or certiorari after conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both, or (2) if he was released in connection with a charge of misdemeanor, be fined not more than the maximum provided for such misdemeanor or imprisoned for not more than one year, or both, or (3) if he was released for appearance as a material witness, shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

Added Pub. L. 89-465, § 3(a), June 22, 1966, 80 Stat. 216.

§ 3150a. Refund of forfeited bail

Appropriations available to refund money erroneously received and deposited in the Treasury are available to refund any part of forfeited bail deposited into the general fund of the Treasury and ordered remitted under the Federal Rules of Criminal Procedure.

Added Pub. L. 97-258, § 2(d)(3)(B), Sept. 13, 1982, 96 Stat. 1058.

§ 3151. Contempt

Nothing in this chapter shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt.

§ 3152. Establishment of pretrial services

(a) On and after the date of the enactment of the Pretrial Services Act of 1982, the Director of the Administrative Office of the United States Courts (hereinafter in this chapter referred to as the 'Director') shall, under the supervision and direction of the Judicial Conference of the United States, provide directly, or by contract or otherwise (to such extent and in such amounts as are provided in appropriation Acts), for the establishment of pretrial services in each judicial district (other than the District of Columbia). Pretrial services established under this section shall be supervised by a chief probation officer appointed under section 3654 of this title or by a chief pretrial services officer selected under subsection (c) of this section.

(b) Beginning eighteen months after the date of the enactment of the Pretrial Services Act of 1982, if an appropriate United States district court and the circuit judicial council jointly recommend the establishment under this subsection of pretrial services in a particular district, pretrial services shall be established under the general authority of the Administrative Office of the United States Courts.

(c) The pretrial services established under subsection (b) of this section shall be supervised by a chief pretrial services officer selected by a panel consisting of the chief

judge of the circuit, the chief judge of the district, and a magistrate of the district or their designees. The chief pretrial services officer appointed under this subsection shall be an individual other than one serving under authority of section 3654 of this title.

Added Pub. L. 93-619, Title II, § 201, Jan. 3, 1975, 88 Stat. 2086, and amended Pub. L. 97-267, § 2, Sept. 27, 1982, 96 Stat. 1136.

§ 3153. Organization and administration of pretrial services

(a)(1) With the approval of the district court, the chief pretrial services officer in districts in which pretrial services are established under section 3152(b) of this title shall appoint such other personnel as may be required. The position requirements and rate of compensation of the chief pretrial services officer and such other personnel shall be established by the Director with the approval of the Judicial Conference of the United States, except that no such rate of compensation shall exceed the rate of basic pay in effect and then payable for grade GS-16 of the General Schedule under section 5332 of title 5, United States Code.

(2) The chief pretrial services officer in districts in which pretrial services are established under section 3152 (b) of this title is authorized, subject to the general policy established by the Director and the approval of the district court, to procure temporary and intermittent services to the extent authorized by section 3109 of title 5, United States Code. The staff, other than clerical staff, may be

drawn from law school students, graduate students, or such other available personnel.

(b) The chief probation officer in all districts in which pretrial services are established under section 3152(a) of this title shall designate personnel appointed under chapter 231 of this title to perform pretrial services under this chapter.

(c)(1) Except as provided in paragraph (2) of this subsection, information obtained in the course of performing pretrial services functions in relation to a particular accused shall be used only for the purposes of a bail determination and shall otherwise be confidential. Each pretrial services report shall be made available to the attorney for the accused and the attorney for the Government.

(2) The Director shall issue regulations establishing the policy for release of information made confidential by paragraph (1) of this subsection. Such regulations shall provide exceptions to the confidentiality requirements under paragraph (1) of this subsection to allow access to such information—

(A) by qualified persons for purposes of research related to the administration of criminal justice;

(B) by persons under contract under section 3154(4) of this title;

(C) by probation officers for the purpose of compiling presentence reports;

(D) insofar as such information is a pretrial diversion report, to the attorney for the accused and the attorney for the Government; and

(E) in certain limited cases, to law enforcement agencies for law enforcement purposes.

(3) Information made confidential under paragraph (1) of this subsection is not admissible on the issue of guilt in a criminal judicial proceeding unless such proceeding is a prosecution for a crime committed in the course of obtaining pretrial release or a prosecution for failure to appear for the criminal judicial proceeding with respect to which pretrial services were provided.

Added Pub. L. 93-619, Title II, § 201, Jan. 3, 1975, 88 Stat. 2086, and amended Pub. L. 97-267, § 3, Sept. 27, 1982, 96 Stat. 1136.

§ 3154. Functions and powers relating to pretrial services

Pretrial services functions shall include the following:

(1) Collect, verify, and report to the judicial officer, prior to the pretrial release hearing, information pertaining to the pretrial release of each individual charged with an offense, including information relating to any danger that the release of such person may pose to any other person or the community, and recommend appropriate release conditions for such individual.

(2) Review and modify the reports and recommendations specified in paragraph (1) of this section for persons seeking release pursuant to section 3146 (e) or section 3147 of this chapter.

(3) Supervise persons released into its custody under this chapter.

(4) Operate or contract for the operation of appropriate facilities for the custody or care of persons released under this chapter including residential halfway houses, addict and alcoholic treatment centers, and counseling services.

(5) Inform the court and the United States attorney of all apparent violations of pretrial release conditions, arrests of persons released to the custody of providers of pretrial services or under the supervision of providers of pretrial services, and any danger that any such person may come to pose to any other person or the community, and recommend appropriate modifications of release conditions.

(6) Serve as coordinator for other local agencies which serve or are eligible to serve as custodians under this chapter and advise the court as to the eligibility, availability, and capacity of such agencies.

(7) Assist persons released under this chapter in securing any necessary employment, medical, legal, or social services.

(8) Prepare, in cooperation with the United States marshal and the United States attorney such pretrial detention reports as are required by the provisions of the Federal Rules of Criminal Procedure relating to the supervision of detention pending trial.

(9) Develop and implement a system to monitor and evaluate bail activities, provide information to judicial officers on the results of bail decisions, and prepare periodic reports to assist in the improvement of the bail process.

(10) To the extent provided for in an agreement between a chief pretrial services officer in districts in which pretrial services are established under section 3152(b) of this title, or the chief probation officer in all other districts, and the United States attorney, collect, verify, and prepare reports for the United States attorney's office of information pertaining to the pretrial diversion of any individual who is or may be charged with an offense, and perform such other duties as may be required under any such agreement.

§ 3155. Annual reports

Each chief pretrial services officer in districts in which pretrial services are established under section 3152(b) of this title, and each chief probation officer in all other districts, shall prepare an annual report to the chief judge of the district court and the Director concerning the administration and operation of pretrial services. The Director shall be required to include in the Director's annual report to the Judicial Conference under section 604 of title 28 a report on the administration and operation of the pretrial services for the previous year.

Added Pub. L. 93-619, Title II, § 201, Jan. 3, 1975, 88 Stat. 2088, and amended Pub. L. 97-267, § 5, Sept. 27, 1982, 96 Stat. 1138.

§ 3156. Definitions

(a) As used in sections 3146-3150 of this chapter—

(1) The term "judicial officer" means, unless otherwise indicated, any person or court authorized

pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to bail or otherwise release a person before trial or sentencing or pending appeal in a court of the United States, and any judge of the Superior Court of the District of Columbia; and

(2) The term "offense" means any criminal offense, other than an offense triable by court-marshal, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress.

(b) As used in sections 3152-3155 of this chapter—

(1) the term "judicial officer" means, unless otherwise indicated, any person or court authorized pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to bail or otherwise release a person before trial or sentencing or pending appeal in a court of the United States, and

(2) the term "offense" means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a petty offense as defined in section 1(3) of this title, or an offense triable by court-martial, military commission, provost court, or other military tribunal).

Added Pub. L. 93-619, Title II, § 201, Jan. 3, 1975, 88 Stat. 2088.

RULE 46 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 46. Release from Custody

(a) Release Prior to Trial. Eligibility for release prior to trial shall be in accordance with 18 U.S.C. § 3146, § 3148, or § 3149.

(b) Release During Trial. A person released before trial shall continue on release during trial under the same terms and conditions as were previously imposed unless the court determines that other terms and conditions or termination of release are necessary to assure his presence during the trial or to assure that his conduct will not obstruct the orderly and expeditious progress of the trial.

(c) Pending Sentence and Notice of Appeal. Eligibility for release pending sentence or pending notice of appeal or expiration of the time allowed for filing notice of appeal, shall be in accordance with 18 U.S.C. § 3148. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.

(d) Justification of Sureties. Every surety, except a corporate surety which is approved as provided by law, shall justify by affidavit and may be required to describe in the affidavit the property by which he proposes to justify and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by him and remaining undischarged and all his other liabilities. No bond shall be approved unless the surety thereon appears to be qualified.

(e) Forfeiture.

(1) Declaration. If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.

(2) Setting Aside. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

(3) Enforcement. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses.

(4) Remission. After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

(f) Exoneration. When the condition of the bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody.

(g) Supervision of Detention Pending Trial. The court shall exercise supervision over the detention of defendants and witnesses within the district pending trial for the purpose of eliminating all unnecessary detention. The attorney for the government shall make a biweekly report to the court listing each defendant and witness who has been held in custody pending indictment, arraignment or trial for a period in excess of ten days. As to each witness so listed the attorney for the government shall make a statement of the reasons why such witness should not be released with or without the taking of his deposition pursuant to Rule 15(a). As to each defendant so listed the attorney for the government shall make a statement of the reasons why the defendant is still held in custody.

As amended Apr. 9, 1956; Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972.